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No. 09-270

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL BURNELL MARLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. There Is A Direct Conflict Regarding Whether Section 2401(B) Is Subject To Equitable Limitations

The courts of appeals are sharply divided regarding whether section 2401(b) is jurisdictional and thus bars equitable tolling or estoppel. Respondent contends that this is not a real conflict, because some of those decisions involve the section 2401(b) two-year deadline, while others concerned the section 2401(b) six-month deadline. But no appellate decision has ever held that the two deadlines should be treated differently, and the United States itself has repeatedly insisted that the deadlines are governed by the same rule.

The deadlines at issue are not separate provisions of the Federal Tort Claims Act. Rather they are two clauses in a single sentence:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented.

Whether equitable tolling (or estoppel) is available under section 2401(b) turns on the meaning of the phrase "shall be forever barred." It is exceptionally unlikely that this single phrase actually has two different meanings (one permitting equitable tolling, one not), depending on whether the six-month or two-year

limitation is at issue. That would be like saying (in light of the multiple meanings of the word "hot") that "a bowl of chili is hot if it is heated to 150 degrees, or contains a lot of chili pepper, or was stolen, or is one of the most popular dishes in town."

In the court of appeals in the instant case, the United States drew no distinction between the two deadlines. It correctly observed that since 1991 "the circuits have split on whether the time limitations [plural] contained in the FTCA remain jurisdictional in nature."[1] The government's characterization of that circuit split properly attached no significance to whether the dispute in the cases it cited concerned the two-year deadline or, as in the instant case, the six-month deadline. Of the eight cases relied on by the United States as demonstrating the existence of this "split," seven involved the two-year rule.

A. The Ninth Circuit Held That Section 2401(b) – Not Merely Its Six-Month Deadline – Is Jurisdictional and Bars Equitable Limitations

In its brief in opposition respondent suggests that the Ninth Circuit held only that the six-month requirement is jurisdictional. (Br. Opp. 7). But in the court below the United States repeatedly and correctly described the panel opinion as holding that

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[1] Brief for Defendant-Appellee, at 49.

section 2401(b) as a whole, not merely one portion of it, is jurisdictional.

> [T]he panel concluded that the jurisdictional character of 28 U.S.C. § 2401(b) was well-established in the Ninth Circuit by clear and longstanding precedent ... and that this earlier precedent served to rebut any *Irwin*-based presumption that 28 U.S.C. § 2401(b) was other than jurisdictional.... [Various] factors led the Court to conclude, independently of past precedent, that 28 U.S.C. § 2401(b) is jurisdictional.... The panel ... cit[ed] numerous cases which hold ... that 28 U.S.C. § 2401(b) is jurisdictional.... [T]he court correctly determined that 28 U.S.C. § 2401(b) is a jurisdictional statute....

(Appellee's Answer to Petition for Rehearing *En Banc*, at 7-8, 14, 16).

Although the particular provision at issue in the instant case is the six-month deadline, the decision of the court of appeals below repeatedly articulated the Ninth Circuit rule that section 2401(b) – not merely one or the other of its deadlines – is jurisdictional. "[W]e must decide whether we have jurisdiction over a claim that does not meet the deadlines [plural] contained in § 2401(b)." (App. 8). "Our more recent cases ... reflect the view that the timing requirements [plural] of § 2401(b) are jurisdictional." (App. 12).[2]

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[2] See App. 12 ("the requirements of § 2401(b) ... are jurisdictional in nature ... ") (quoting *Blain v. United States*, 552 F.2d 289, 291 (9th Cir.1977)).

"We have long held that § 2401(b) is jurisdictional." (App. 11).[3] "[E]quitable exceptions do not apply to § 2401(b)." (App. 14). "Congress explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b)." (*Id.*). "Congress intended the deadlines [plural] of § 2401(b) to be adhered to strictly." (App. 15).

In holding that section 2401(b) (as a whole) is jurisdictional, the Ninth Circuit explained that "the answer [is] in our own precedent." (App. 11). Of the six Ninth Circuit decisions relied on by the opinion below in holding that section 2401(b) is jurisdictional, four were cases that involved the two-year deadline rather than the six-month deadline at issue in the instant case.[4]

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[3] See also App. 12 ("Timely compliance with section 2401(b) is a jurisdictional prerequisite to maintenance of a FTCA suit") (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)), 15 ("§2401(b) is jurisdictional"), 15 (holding non-precedential the holding in *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir.1996), "that § 2401(b) is not jurisdictional."), 17 (*Alvarez-Machain* "implicitly held that § 2401(b) is non-jurisdictional").

[4] App. 12-13. The cited cases involving the two-year rule were *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.2002), *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983), *Blain v. United States*, 552 F.2d 289, 291 (9th Cir.1977), and *Mann v. United States*, 399 F.2d 672, 673 (9th Cir.1968).

The government urged the court below to adopt precisely that broad rule that section 2401(b) is jurisdictional.

> Whether the time limits of 28 U.S.C. § 2401(b) are jurisdictional can have significant ramifications in FTCA litigation.... Until recently, the courts had held with virtual unanimity that the provisions of 28 U.S.C. § 2401(b) were jurisdictional.... This Circuit has ... stated unequivocally that the FTCA's statute of limitations periods continue to be seen as jurisdictional in nature.[5]

The words "limits," "provisions" and "periods" are all plural. In support of its contention that Ninth Circuit precedent demonstrated that section 2401(b) is jurisdictional, the government relied particularly on Ninth Circuit decisions involving the two-year deadline, despite the fact that the instant case concerns the application of the six-month deadline.[6] In opposing rehearing en banc, the United States insisted that the panel had properly held section 2401(b) jurisdictional because "this Court has consistently held that the FTCA statute of limitations is jurisdictional in nature," citing two Ninth Circuit cases concerning the limitations periods in section 2401(b), one of

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[5] Brief for Defendant-Appellee, at 43-44, 51.

[6] *Id.* at 51-52. Three of the five cases relied on by the government involved the two-year rule. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.2002); *United States v. 87 Skyline Terrace*, 26 F.3d 923, 929 (9th Cir.1994); *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir.1995).

which (unlike the instant case) involved the two-year rule.[7]

B. Decisions In Four Circuits Hold That Section 2401(b) – Not Merely Its Two-Year Deadline – Is Not Jurisdictional and Thus Permits Application of Equitable Limitations

Respondent characterizes the decisions in the First, Third, Fifth and Sixth circuits as holding only that the "two-year limit for presenting [a] tort claim to the relevant agency in 28 U.S.C. § 2401(b) is not jurisdictional." (Br. Opp. 8). None of these decisions, however, adopted an interpretation of the two-year rule as such; rather, each of them held that section 2401(b) itself is not jurisdictional, and then applied that general rule to a case which happened to concern the two-year rule. The First and Sixth Circuits have also applied this interpretation of section 2401(b) to cases involving the six-month deadline.

The First Circuit decision in *Rakes v. United States*, 442 F.3d 7, 25 (1st Cir.2006), held that "equitable tolling defenses are applicable in the context of the FTCA," not in the context of the two-year deadline. In its brief in the court below respondent characterized *Rakes* as holding that "equitable tolling

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[7] Appellee's Answer to Petition for Rehearing *En Banc*, at 10-11 (citing *Burns v. United States*, 764 F.2d 722 (9th Cir.1985)).

defenses are available in FTCA cases."[8] The First Circuit's analysis in *Rakes* drew no distinction between the two-year and six-month deadlines. 442 F.3d at 25. In *de Casenave v. United States*, 991 F.2d 11 (1st Cir.1993), the First Circuit held that the equitable tolling rule in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), applies to the six-month deadline in section 2401(b). 991 F.2d at 12 n.2.[9]

The Third Circuit in *Santos v. United States*, 559 F.3d 189, 196 (3d Cir.2009), held that "equitable tolling is possible under the FTCA." The reasoning in *Santos* concerned section 2401(b) as a whole. 559 F.3d at 195-96. The government correctly characterized *Santos* as involving the "question of ... whether the limitations periods [plural] of the Federal Tort Claims Act are jurisdictional and may be expanded by equitable tolling."[10]

The Fifth Circuit decision in *Perez v. United States*, 167 F.3d 913 (5th Cir.1999), clearly covered section 2401(b) as a whole.

> [W]hether the limitations provisions [plural] of the FTCA are jurisdictional – in which

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[8] Brief for Defendant-Appellee, at 49.

[9] "The district court held that, because the six-month statute of limitations was jurisdictional, it had no power to apply principles of equitable tolling to plaintiffs' claim. In light of the Supreme Court's holding in *Irwin* ... , the district court's refusal to entertain plaintiff's tolling argument was erroneous."

[10] Petition for Rehearing and Rehearing *En Banc*, *Santos v. United States*, No. 07-4163 (3d Cir.), at first unnumbered page.

> case equitable tolling could not apply – remains an open question in this circuit.... Section 2401 is a garden variety limitations provision, without the attention to detail in [the tax provision held jurisdictional in *United States v. Brockamp*, 519 U.S. 347 (1997)].... [A]llowing equitable tolling would not create an administrative nightmare for the FTCA regime, which encompasses far fewer claims than might be filed against the Internal Revenue Service. Thus, where the principles of equitable tolling would ordinarily apply, such tolling should be allowed in an FTCA case.

167 F.3d at 915-17. *Perez* described the Eighth Circuit decision in *Schmidt v. United States*, 993 F.2d 639 (8th Cir.1991), which held that section 2401(b) "was not jurisdictional," as having "arrived at the same result we will reach." 993 F.3d at 916. *Schmidt* involved the six-month requirement in section 2401(b), rather than the two-year requirement at issue in *Perez* itself, a distinction that the Fifth Circuit correctly regarded as irrelevant.

The Sixth Circuit decision in *Glarner v. United States*, 30 F.3d 697 (6th Cir.1994), also relying on *Schmidt*, announced an interpretation of section 2401(b) as a whole.

> [T]he V[eterans Administration] ... argues that the doctrine of equitable tolling cannot apply to § 2401(b) because the latter is a jurisdictional statute of limitations that cannot be equitably tolled. This assertion is

> incorrect.... Though *Irwin* dealt specifically with a Title VII statute of limitations, ... the equitable tolling presumption applies to § 2401(b) as well.... Thus, in accord with *Schmidt*, § 2401(b) can be equitably tolled.

30 F.3d at 701. The Sixth Circuit has twice applied *Glarner* to appeals regarding the six-month deadline in section 2401(b). *Brockett v. Parks*, 48 Fed.Appx. 539, 540 (6th Cir.2002); *Warren v. United States*, 2000 WL 1800559 at *1 (6th Cir.2000).

The brief in opposition intimates that the Eighth Circuit decision in *T.L. ex rel. Ingram v. United States*, 443 F.3d 956 (8th Cir.2006), was addressing only the two-year limitation period when it held that equitable tolling is permissible even where a statute of limitations is jurisdictional. (Br. Opp. 9). But *T.L.* was not limited to and contains no specific discussion of the two-year deadline; it holds, rather, that "the rule of equitable tolling applies in FTCA cases ... because Congress intended it to apply." 443 F.3d at 961. In its brief in the court below the United States correctly described *T.L.* as holding that "Congress intended equitable tolling to apply in FTCA cases."[11]

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[11] Brief for Defendant-Appellee, at 51.

C. The Inter-Circuit Conflict Is Direct and Well Established

The government suggests that there are two possible reasons why the six-month limitation period might be jurisdictional even if the two-year limitation period is not. First, respondent notes that the six-month deadline "is short, to ensure particular expedition." (Br. Opp. 10). Second, it points out that the six-month period "is triggered by a specific notice ... which sets a readily identifiable date for the filing of a suit." (*Id.*). The government stresses that "the notice to petitioner expressly informed him that suit must be filed within six months." (*Id.*).

But those very circumstances were present in *Irwin v. Department of Veterans Affairs*, 489 U.S. 89 (1990), which held that equitable tolling is applicable to claims against the United States under Title VII. The applicable provision in *Irwin* required that such an action must be filed "[w]ithin thirty days of receipt of notice of final action taken" by the EEOC, 42 U.S.C. § 2000e-16(c), a period shorter than the six-month rule in section 2401(b). Like the six-month deadline in section 2401(b), section 2000e-16(c) is also triggered by "a readily identifiable date for the filing of a suit." The standard letter sent to the petitioner in *Irwin*, like the letter sent in this case, "expressly informed him that suit must be filed within" the

applicable deadline.[12] The government in *Irwin* relied on these same circumstances in unsuccessfully urging the Court to bar equitable tolling under section 2000e-16(c).[13] If those contentions were insufficient to preclude equitable tolling in *Irwin*, they cannot be sufficient to do so here.

II. There Is No Reason To Delay Resolution of This Inter-Circuit Conflict

The government suggests that resolution of this inter-circuit conflict would be premature "until other circuits have had the opportunity to consider the issue in light of *John R. Sand & Gravel* [*Co. v. United States*, 552 U.S. 130 (2008)]." (Br. Opp. 10). But there is no possibility that further airing of this issue would resolve the conflict.

The Third Circuit has already expressly considered the issue in light of *John R. Sand & Gravel*.

> In reaching our result that equitable tolling is possible under the FTCA, we recognize that the reasoning in certain recent Supreme

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[12] *Irwin v. Department of Veterans Affairs*, No. 89-5867, J.App. at 3.

[13] *Irwin v. Department of Veterans Affairs*, No. 89-5867, Brief for Respondent at 19 ("[B]ecause the time period is triggered by receipt of the notice of the right to sue there is no uncertainty about the claimant's knowledge of his legal remedies, as there may be in the context of the initial filing of the complaint."); see *id.* at 16 (arguing that 30-day limitation period is particularly short).

> Court decisions might call into question whether equitable tolling is available in FTCA claims ... *See John R. Sand & Gravel*.... *Irwin* remains good law, for the court in *John R.* applied but did not overrule *Irwin*....

Santos, 559 F.3d at 196-97. Thus even if the First, Fifth and Sixth Circuits – which now permit equitable tolling – change their interpretation of section 2401(b), there will still be a conflict between the Third and Ninth Circuits.

In order to alter their current construction of section 2401(b), moreover, the First, Fifth and Sixth Circuits would have to actually reject the Ninth Circuit's interpretation of *J.R. Sand & Gravel*. The decision below read *J.R. Sand & Gravel* to mean that a court of appeals should rely on its own precedents in deciding whether a time limitation is jurisdictional.

> Using the principle of stare decisis, the Court [in *J.R. Sand & Gravel*] relied on cases in which it had held that the statute was not one that could be equitably tolled.... We, too, can find the answer in *our own* precedent. *We* have long held that § 2401(b) is jurisdictional.... Just as the Supreme Court in *John R. Sand & Gravel* relied on its past cases to conclude that the statute of limitations at issue there was jurisdictional ... so, too, we are bound by *our own* precedents to hold that the limitations period in § 2401(b) is jurisdictional.

(App. 11-13) (emphasis added). If the First, Fifth and Sixth Circuits applied that same reading, they would conclude that they were "bound by" the precedents in their respective circuits which hold that section 2401(b) is *not* jurisdictional.

Moreover, future level developments regarding whether (in light of *John R. Sand & Gravel*) section 2401(b) is jurisdictional will not alter the rule in the Eighth Circuit in *T.L.*, which holds that equitable tolling is available under the FTCA even though the Eighth Circuit regards section 2401(b) as jurisdictional.

Under the current alignment of the circuits, there is a 5-1 split in favor of tolling in section 2401(b) cases. In the unlikely event that the First, Fifth and Sixth Circuits at some point conclude in light of *John R. Sand & Gravel* that section 2401(b) is jurisdictional, there will still be a 2-4 split regarding the availability of tolling. Because consideration of *John R. Sand & Gravel* clearly is not going to eliminate the current inter-circuit conflict, certiorari should be granted to resolve the issue which clearly will continue to divide the courts of appeals.

III. The Question Presented Is Substantial

Respondent suggests that review by this Court is not warranted because the Ninth Circuit was correct when it concluded that equitable tolling is not available in this case. In the court below, however, the

government contended to the contrary that equitable tolling *is* available in a case under section 2401(b):

> The United States submits that the Court should find that the FTCA's statute of limitations is jurisdictional but subject to equitable tolling in appropriate cases.... We urge the court to find that the FTCA's statute of limitations is jurisdictional but, in the appropriate case, equitable tolling may apply.[14]

The government, of course, is permitted to change its position as to whether equitable tolling is permitted under section 2401(b), as has now occurred. But having done so, the United States cannot plausibly argue that the correct interpretation of the statute is so obvious that review by this Court is unnecessary.

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[14] Brief for Defendant-Appellee at 54-55. The government urged the Ninth Circuit to adopt the rule in the Eighth Circuit decision in *T.L.*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

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